

# WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

## **Title 76, Chapter 5, Part 4** drafted by Victoria

### **LONG TITLE**

#### **General Description:**

This bill

#### **Highlighted Provisions:**

This bill:

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#### **Money Appropriated in this Bill:**

None

#### **Other Special Clauses:**

None

#### List of sections affected:

#### **AMENDS:**

76-5-401

76-5-401.1

76-5-401.2

76-5-401.3

76-5-402

76-5-402.1

76-5-402.2

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31 76-5-402.3

32 76-5-403

33 76-5-403.1

34 76-5-404

35 76-5-404.1

36 76-5-405

37 76-5-406

38 76-5-406.3

39 76-5-406.5

40 76-5-407

41 76-5-409

42 76-5-410

43 76-5-412

44 76-5-413

45 76-5-414

46 76-5-415

47 ENACTS:

48 76-5-404.2

49 76-5-412.5

50 76-5-413.5

51 REPEALS:

52 76-5-416 VA NOTE: THE DEFINITION OF "INDECENT LIBERTIES" WAS MOVED FROM  
53 THIS SECTION (WHICH ONLY DEFINED THE TERM) TO 401.1, WHERE THE TERM IS  
54 USED, AND THEN OTHER STATUTES USING THE TERM XREF 401.1 SO FUTURE  
55 AMENDMENTS KEEP THE DEFINITIONS PARALLEL

56 Statutory text:

57 **76-5-401. Unlawful sexual activity with a minor -- ~~[Elements--]~~ Penalties --**  
58 **Evidence of age raised by defendant.**

59 (1) ~~[For purposes of]~~ (a) As used in this section ~~\_, ["minor" is a person]~~ "minor"  
60 means an individual who is 14 years ~~[of age]~~ old or older, but younger than 16 years ~~[of~~  
61 age] old, at the time the sexual activity described in ~~[this section]~~ Subsection (2) occurred.  
62 (b) Definitions of terms in Section 76-1-101.5 apply to this section.

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63 (2) ~~[A person]~~ (a) Except as provided in Subsection (4), an actor 18 years old or  
64 older commits unlawful sexual activity with a minor if ~~[, under circumstances not amounting to~~  
65 ~~rape, in violation of Section 76-5-402, object rape, in violation of Section 76-5-402.2, forcible~~  
66 ~~sodomy, in violation of Section 76-5-403, or aggravated sexual assault, in violation of Section~~  
67 ~~76-5-405,]~~ the actor:

68 ~~[(a)]~~ (i) has sexual intercourse with the minor;

69 ~~[(b)]~~ (ii) engages in any sexual act with the minor involving the genitals of ~~[one~~  
70 ~~person]~~ an individual and the mouth or anus of another ~~[person, regardless of the sex of~~  
71 ~~either participant,]~~ individual; or VA NOTE: I HAVE DELETED "REGARDLESS OF THE  
72 SEX OF EITHER PARTICIPANT" IN SEVERAL SECTIONS AS IT SEEMED  
73 UNNECESSARY

74 ~~[(c)]~~ (iii) causes the penetration, however slight, of the genital or anal opening of the  
75 minor by ~~[any]~~ a foreign object, substance, instrument, or device, including a part of the  
76 human body, with the intent to cause substantial emotional or bodily pain to ~~[any person]~~ an  
77 individual or with the intent to arouse or gratify the sexual desire of ~~[any person, regardless~~  
78 ~~of the sex of any participant,]~~ an individual.

79 (b) Any touching, however slight, is sufficient to constitute the relevant element of a  
80 violation of Subsection (2)(a)(ii). VA NOTE: THIS LANGUAGE IS MOVED FROM 76-5-  
81 407(2)(b)(i) PLEASE CHECK

82 VA NOTE: ALSO NOTE THAT 76-5-407(2)(a)(i) REFERENCES THIS STATUTE  
83 ABOUT PENETRATION, HOWEVER SLIGHT. BUT THAT SEEMS TO BE COVERED IN  
84 (2)(a)(ii) SO I HAVE NOT ADDED THE 407 LANGUAGE (WHICH WILL BE REPEALED)  
85 HERE. PLEASE CHECK

86 (3) (a) ~~[Except under Subsection (3)(b) or (c), a]~~ A violation of Subsection (2) is a  
87 third degree felony.

88 (b) ~~[(f)]~~ (i) Notwithstanding Subsection (3)(a), if the defendant establishes by a  
89 preponderance of the evidence the mitigating factor that the defendant is less than four years  
90 older than the minor at the time the sexual activity occurred, the offense is a class B  
91 misdemeanor.

92 (ii) An offense under ~~[this]~~ Subsection (3)(b) (i) is not subject to registration under  
93 Subsection 77-41-102(17)(a)(vii).

94 (c) ~~[(f)]~~ (i) Notwithstanding Subsection (3)(a) or (b), if the defendant establishes by a

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95 preponderance of the evidence the mitigating factor that the defendant was younger than 21  
96 years old at the time the sexual activity occurred, the offense is a class A misdemeanor.

97 (ii) An offense under [this] Subsection (3)(c) (i) is not subject to registration under  
98 Subsection 77-41-102(17)(a)(vii).

99 (5) If the conduct of an actor 18 years old or older amounts to a violation under one or  
100 more of the following, or an attempt to violate one or more of the following VA NOTE:

101 ADDED ATTEMPT, the actor shall be charged with the violation and not under Subsection  
102 (2)(a):

103 (a) rape, in violation of Section 76-5-402;

104 (b) object rape, in violation of Section 76-5-402.2;

105 (c) forcible sodomy, in violation of Section 76-5-403; or

106 (d) aggravated sexual assault, in violation of Section 76-5-405.

107 **76-5-401.1. Sexual abuse of a minor -- Penalty .**

108 (1) ~~[For purposes of]~~ (a) As used in this section ~~[minor is]~~ :

109 (i) "Indecent liberties" means:

110 (A) the actor touching a harmed individual's genitals, anus, buttocks, pubic area, or,  
111 female breast;

112 (B) causing any part of a harmed individual's body to touch the actor's or another's  
113 genitals, pubic area, anus, buttocks, or female breast;

114 (C) simulating or pretending to engage in sexual intercourse with a harmed individual,  
115 including genital-genital, oral-genital, anal-genital, or oral-anal intercourse; or

116 (D) causing a harmed individual to simulate or pretend to engage in sexual  
117 intercourse with the actor or another, including genital-genital, oral-genital, anal-genital, or  
118 oral-anal intercourse.

119 (ii) "Minor means an individual who is 14 years ~~[of age]~~ old or older, but younger  
120 than 16 years ~~[of age]~~ old, at the time the sexual activity described in ~~[this section]~~  
121 Subsection (2) occurred.

122 (b) Definitions of terms in Section 76-1-101.5 apply to this section.

123 (2) ~~[An individual]~~ (a) Except as provided in Subsection (4), an actor commits sexual  
124 abuse of a minor if the ~~[individual]~~ actor:

125 (i) is four years or more older than the minor ; and ~~[, under circumstances not~~  
126 ~~amounting to rape, in violation of Section 76-5-402, object rape, in violation of Section~~

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127 ~~76-5-402.2, forcible sodomy, in violation of Section 76-5-403, aggravated sexual assault, in~~  
128 ~~violation of Section 76-5-405, unlawful sexual activity with a minor, in violation of Section~~  
129 ~~76-5-401, or an attempt to commit any of those offenses, the individual]~~

130 (ii) with the intent to cause substantial emotional or bodily pain to any individual, or  
131 with the intent to arouse or gratify the sexual desire of any individual:

132 (A) touches the anus, buttocks, pubic area, or any part of the genitals of the minor[;  
133 or] ;

134 (B) touches the breast of a female minor[;] ; or

135 (C) otherwise takes indecent liberties with the minor . [;with the intent to cause  
136 substantial emotional or bodily pain to any individual or with the intent to arouse or gratify the  
137 sexual desire of any individual regardless of the sex of any participant.]

138 (b) Any touching, even if accomplished through clothing, is sufficient to constitute the  
139 relevant element of a violation of Subsection (2). VA NOTE: THIS LANGUAGE IS MOVED  
140 FROM 76-5-407(3)(c) PLEASE CHECK

141 (3) A violation of ~~[this section]~~ Subsection (2)(a) is :

142 (a) a class A misdemeanor ; and

143 (b) is not subject to registration under Subsection 77-41-102(17)(a)(viii) on a first  
144 offense if the offender was younger than 21 years [of age] old at the time of the offense.

145 (4) If the conduct of an actor who is four years old or older than a minor amounts to a  
146 violation under one or more of the following, or an attempt to violate one or more of the  
147 following, the actor shall be charged with the violation and not under Subsection (2)(a):

148 (a) rape, in violation of Section 76-5-402;

149 (b) object rape, in violation of Section 76-5-402.2;

150 (c) forcible sodomy, in violation of Section 76-5-403;

151 (d) aggravated sexual assault, in violation of Section 76-5-405; or

152 (e) unlawful sexual activity with a minor, in violation of Section 76-5-401.

153 **76-5-401.2. Unlawful sexual conduct with a 16- or 17-year-old -- Penalties .**

154 (1) (a) As used in this section[,"minor"] :

155 (i) "Indecent liberties" means the same as that term is defined in Section 76-5-401.1.

156 (ii) "Minor" means an individual who is 16 years[~~of age or older~~] old or older , but

157 younger than 18 years [of age] old , at the time the sexual conduct described in Subsection

158 (2) occurred.

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(b) Definitions of terms in Section 76-1-101.5 apply to this section.

(2) (a) ~~[An individual]~~ Except as provided in Subsection (4), an actor commits unlawful sexual conduct with a minor if ~~[, under circumstances not amounting to an offense listed under Subsection (3), an individual who is]~~ the actor:

(i) (A) is seven or more years older but less than 10 years older than the minor at the time of the sexual conduct ;

(B) engages in any conduct listed in Subsection (2)(b)[,] ; and

(C) [the individual] knew or reasonably should have known the age of the minor; or

(ii) (A) is 10 or more years older than the minor at the time of the sexual conduct ;

and

(B) engages in any conduct listed in Subsection (2)(b).

(b) As used in Subsection (2)(a), "sexual conduct" refers to when ~~[the individual]~~ the actor :

(i) has sexual intercourse with the minor;

(ii) engages in any sexual act with the minor involving the genitals of one individual and the mouth or anus of another individual ~~[, regardless of the sex of either participant];~~

(iii) (A) causes the penetration, however slight, of the genital or anal opening of the minor by any foreign object, substance, instrument, or device, including a part of the human body[,] ; and VA NOTE: 76-5-407(2)(a)(ii) XREF 76-5-401.2. ALTHOUGH I AM

REPEALING 407, I THINK ITS CURRENT APPLICATION IS ALREADY COVERED BY THE LANGUAGE HERE. PLEASE CHECK.

(B) causes the penetration with the intent to cause substantial emotional or bodily pain to any individual or with the intent to arouse or gratify the sexual desire of any individual ~~[, regardless of the sex of any participant];~~ or

(iv) touches with the intent to cause substantial emotional or bodily pain to any individual or with the intent to arouse or gratify the sexual desire of any individual:

(A) the anus, buttocks, pubic area, or any part of the genitals of the minor ~~[, or touches]~~ ;

(B) the breast of a female minor ~~[,]~~ ; or

(C) otherwise takes indecent liberties with the minor ~~[, with the intent to cause substantial emotional or bodily pain to any individual or with the intent to arouse or gratify the sexual desire of any individual regardless of the sex of any participant.]~~

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~~[(3) The offenses referred to in Subsection (2) are:~~

~~— (a) (i) rape, in violation of Section 76-5-402;~~

~~— (ii) object rape, in violation of Section 76-5-402.2;~~

~~— (iii) forcible sodomy, in violation of Section 76-5-403;~~

~~— (iv) forcible sexual abuse, in violation of Section 76-5-404; or~~

~~— (v) aggravated sexual assault, in violation of Section 76-5-405; or~~

~~— (b) an attempt to commit any offense under Subsection (3)(a).]~~

(c) Any touching, even if accomplished through clothing, is sufficient to constitute the relevant element of a violation of Subsection (2)(a). VA NOTE: THIS LANGUAGE IS MOVED FROM 76-5-407(3)(d) PLEASE CHECK

~~[(4)]~~ (3)(a) A violation of Subsection (2)(b)(i), (ii), or (iii) is a third degree felony.

~~[(5)]~~ (b) A violation of Subsection (2)(b)(iv) is a class A misdemeanor.

(4) If the conduct of the actor described in Subsection (2)(a) amounts to a violation under one or more of the following, or an attempt to violate one or more of the following, the actor shall be charged with the violation and not under Subsection (2)(a):

(a) rape, in violation of Section 76-5-402;

(b) object rape, in violation of Section 76-5-402.2;

(c) forcible sodomy, in violation of Section 76-5-403;

(d) forcible sexual abuse, in violation of Section 76-5-404; or

(e) aggravated sexual assault, in violation of Section 76-5-405.

### **76-5-401.3 Unlawful adolescent sexual activity -- Penalties .**

(1) (a) As used in this section~~[-~~

~~— (a) "Adolescent"]~~ , "adolescent" means an individual in the transitional phase of human physical and psychological growth and development between childhood and adulthood who is 12 years old or older, but under 18 years old.

(b) Definitions of terms in Section 76-1-101.5 apply to this section.

(2) Except as provided in Subsection (4), an actor commits unlawful sexual activity if the actor:

(a) is an adolescent; and

(b) has sexual activity with another adolescent.

~~[(b) "Unlawful adolescent sexual activity" means sexual activity between adolescents under circumstances not amounting to:—~~

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- 223 ~~—— (i) rape, in violation of Section 76-5-402;~~  
224 ~~—— (ii) rape of a child, in violation of Section 76-5-402.1;~~  
225 ~~—— (iii) object rape, in violation of Section 76-5-402.2;~~  
226 ~~—— (iv) object rape of a child, in violation of Section 76-5-402.3;~~  
227 ~~—— (v) forcible sodomy, in violation of Section 76-5-403;~~  
228 ~~—— (vi) sodomy on a child, in violation of Section 76-5-403.1;~~  
229 ~~—— (vii) sexual abuse of a child, in violation of Section 76-5-404;~~  
230 ~~—— (viii) aggravated sexual assault, in violation of Section 76-5-405; or~~  
231 ~~—— (ix) incest, in violation of Section 76-7-102.]~~  
232 ~~[(2) Unlawful adolescent sexual activity is punishable as]~~ (3) A violation of Subsection  
233 (2) is a:  
234 (a) third degree felony if an [adolescent] actor who is 17 years old engages in  
235 unlawful adolescent sexual activity with an adolescent who is 12 or 13 years old ;  
236 (b) third degree felony if an [adolescent] actor who is 16 years old engages in  
237 unlawful adolescent sexual activity with an adolescent who is 12 years old ;  
238 (c) class A misdemeanor if an [adolescent] actor who is 16 years old engages in  
239 unlawful adolescent sexual activity with an adolescent who is 13 years old ;  
240 (d) class A misdemeanor if an [adolescent] actor who is 14 or 15 years old engages  
241 in unlawful adolescent sexual activity with an adolescent who is 12 years old ;  
242 (e) class B misdemeanor if an [adolescent] actor who is 17 years old engages in  
243 unlawful adolescent sexual activity with an adolescent who is 14 years old ;  
244 (f) class B misdemeanor if an [adolescent] actor who is 15 years old engages in  
245 unlawful adolescent sexual activity with an adolescent who is 13 years old ;  
246 (g) class C misdemeanor if an [adolescent] actor who is 12 or 13 years old engages  
247 in unlawful adolescent sexual activity with an adolescent who is 12 or 13 years old; and  
248 (h) class C misdemeanor if an [adolescent] actor who is 14 years old engages in  
249 unlawful adolescent sexual activity with an adolescent who is 13 years old.  
250 (4) If the conduct of the actor described in Subsection (2) amounts to a violation  
251 under one or more of the following, or an attempt to violate one or more of the following VA  
252 NOTE: ADDED ATTEMPT the actor shall be charged with the violation and not under  
253 Subsection (2):  
254 (i) rape, in violation of Section 76-5-402;

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(ii) rape of a child, in violation of Section 76-5-402.1;

(iii) object rape, in violation of Section 76-5-402.2;

(iv) object rape of a child, in violation of Section 76-5-402.3;

(v) forcible sodomy, in violation of Section 76-5-403;

(vi) sodomy on a child, in violation of Section 76-5-403.1;

(vii) sexual abuse of a child, in violation of Section 76-5-404;

(viii) aggravated sexual assault, in violation of Section 76-5-405; or

(ix) incest, in violation of Section 76-7-102.

~~[(3)]~~ (5) An offense under this section is not eligible for a nonjudicial adjustment under Section 80-6-304 or a referral to a youth court under Section 80-6-902.

~~[(4)]~~ (6) Except for an offense that is transferred to a district court by the juvenile court in accordance with Section 80-6-504, the district court may enter any sentence or combination of sentences that would have been available in juvenile court but for the delayed reporting or delayed filing of the information in the district court.

~~[(5)]~~ (7) An offense under this section is not subject to registration under Subsection 77-41-102(17).

### **76-5-402. Rape -- Penalties .**

(1) Definitions of terms in Section 76-1-101.5 apply to this section.

~~[(1) A person]~~ (2)(a) An actor commits rape ~~[when]~~ if the actor has sexual intercourse with another ~~[person]~~ individual without the ~~[victim's]~~ individual's consent.

(b) Any sexual penetration, however slight, is sufficient to constitute the relevant element of a violation of Subsection (2)(a). VA NOTE: THIS LANGUAGE IS MOVED FROM 76-5-407(2)(a)(iii) PLEASE CHECK

~~[(2)]~~ (c) This section applies whether or not the actor is married to the ~~[victim]~~ individual .

(3) ~~[Rape]~~ A violation of Subsection (2) is a felony of the first degree, punishable by a term of imprisonment of:

(a) except as provided in Subsection (3)(b) or (c), not less than five years and which may be for life;

(b) except as provided in Subsection (3)(c) or (4), 15 years and which may be for life, if the trier of fact finds that:

(i) during the course of the commission of the rape the defendant caused serious

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287   bodily injury to another; or

288           (ii) at the time of the commission of the rape, the defendant was younger than 18  
289   years of age and was previously convicted of a grievous sexual offense; or

290           (c) life without parole, if the trier of fact finds that at the time of the commission of the  
291   rape the defendant was previously convicted of a grievous sexual offense.

292           (4) If, when imposing a sentence under Subsection (3)(b), a court finds that a lesser  
293   term than the term described in Subsection (3)(b) is in the interests of justice and states the  
294   reasons for this finding on the record, the court may impose a term of imprisonment of not  
295   less than:

296           (a) 10 years and which may be for life; or

297           (b) six years and which may be for life.

298           (5) The provisions of Subsection (4) do not apply when a [person] defendant is  
299   sentenced under Subsection (3)(a) or (c).

300           (6) Imprisonment under Subsection (3)(b), (3)(c), or (4) is mandatory in accordance  
301   with Section 76-3-406.

### 302       **76-5-402.1. Rape of a child -- Penalties .**

303       (1) Definitions of terms in Section 76-1-101.5 apply to this section.

304       ~~[(1) A person]~~ (2)(a) An actor commits rape of a child ~~[when the person]~~ if the actor  
305   has sexual intercourse with ~~[a child]~~ an individual who is under the age of 14.

306       (b) Any touching, however slight, is sufficient to constitute the relevant element of a  
307   violation of Subsection (2)(a). VA NOTE: THIS LANGUAGE IS MOVED FROM 76-5-  
308   407(2)(b)(iv) PLEASE CHECK

309       ~~[(2) Rape of a child]~~ (3) A violation of Subsection (2) is a first degree felony  
310   punishable by a term of imprisonment of:

311           (a) except as provided in Subsections ~~[(2)]~~ (3) (b) and ~~[(4)]~~ (5), not less than 25  
312   years and which may be for life; or

313           (b) life without parole, if the trier of fact finds that:

314           (i) during the course of the commission of the rape of a child, the defendant caused  
315   serious bodily injury to another; or

316           (ii) at the time of the commission of the rape of a child , the defendant was  
317   previously convicted of a grievous sexual offense.

318       ~~[(3)]~~ (4) Subsection ~~[(2)]~~ (3) (b) does not apply if the defendant was younger than 18

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319 years of age at the time of the offense.

320 ~~[(4)]~~ (5) (a) When imposing a sentence under Subsection ~~[(2)]~~ (3) (a) and ~~[(4)]~~ (5)  
321 (b), a court may impose a term of imprisonment under Subsection ~~[(4)]~~ (5) (b) if:

322 (i) it is a first time offense for the defendant under this section;

323 (ii) the defendant was younger than 21 years ~~[of age]~~ old at the time of the offense;

324 and

325 (iii) the court finds that a lesser term than the term described in Subsection ~~[(2)]~~ (3)

326 (a) is in the interests of justice under the facts and circumstances of the case, including the  
327 age of the ~~[victim]~~ individual described in Subsection (2)(a), and states the reasons for this  
328 finding on the record.

329 (b) If the conditions of Subsection ~~[(4)]~~ (5) (a) are met, the court may impose a term  
330 of imprisonment of not less than:

331 (i) 15 years and which may be for life;

332 (ii) 10 years and which may be for life; or

333 (iii) six years and which may be for life.

334 ~~[(5)]~~ (6) Imprisonment under this section is mandatory in accordance with Section  
335 76-3-406.

### 336 **76-5-402.2. Object rape -- Penalties .**

337 (1) Definitions of terms in Section 76-1-101.5 apply to this section.

338 ~~[(1) A person who, without the victim's consent, causes the penetration, however~~  
339 ~~slight, of the genital or anal opening of another person who is 14 years of age or older by any~~  
340 ~~foreign object, substance, instrument, or device, including a part of the human body other~~  
341 ~~than the mouth or genitals, with intent to cause substantial emotional or bodily pain to the~~  
342 ~~victim or with the intent to arouse or gratify the sexual desire of any person, commits an~~  
343 ~~offense which]~~ VA NOTE: PLEASE REVIEW REWRITE BELOW

344 (2) An actor commits object rape if: VA NOTE: REPLACED "VICTIM" IN  
345 FOLLOWING LANGUAGE WITH "INDIVIDUAL"

346 (a) the actor:

347 (i) acts without an individual's consent;

348 (ii) causes the penetration, however slight, of the genital or anal opening of the  
349 individual by:

350 (A) a foreign object;

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(B) a substance;

(C) an instrument;

(D) a device; or

(E) a part of the human body other than the mouth or genitals; and

(iii)(A) intends to cause substantial emotional or bodily pain to the individual; or

(B) intends to arouse or gratify the sexual desire of any other individual VA NOTE:

SHOULD THIS REFER TO A "THIRD PARTY"?; and

(b) the individual is 14 years old or older.

(3) A violation of Subsection (2) is a first degree felony, punishable by a term of imprisonment of:

(a) except as provided in Subsection ~~[(1)]~~ (3) (b) or (c), not less than five years and which may be for life;

(b) except as provided in Subsection ~~[(1)]~~ (3) (c) or (2), 15 years and which may be for life, if the trier of fact finds that:

(i) during the course of the commission of the object rape the defendant caused serious bodily injury to another; or

(ii) at the time of the commission of the object rape, the defendant was younger than 18 years of age and was previously convicted of a grievous sexual offense; or

(c) life without parole, if the trier of fact finds that at the time of the commission of the object rape, the defendant was previously convicted of a grievous sexual offense.

~~[(2)]~~ (4) If, when imposing a sentence under Subsection ~~[(1)]~~ (3) (b), a court finds that a lesser term than the term described in Subsection ~~[(1)]~~ (3) (b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:

(a) 10 years and which may be for life; or

(b) six years and which may be for life.

~~[(3)]~~ (5) The provisions of Subsection ~~[(2)]~~ (4) do not apply when a [person] defendant is sentenced under Subsection ~~[(1)]~~ (3) (a) or (c).

~~[(4)]~~ (6) Imprisonment under Subsection ~~[(1)(b), (1)(c), or (2)]~~ (3)(b), (3)(c), or (4) is mandatory in accordance with Section 76-3-406.

### **76-5-402.3. Object rape of a child -- Penalty.**

(1) Definitions of terms in Section 76-1-101.5 apply to this section.

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383 VA NOTE: PLEASE REVIEW FOLLOWING REWRITE

384 ~~[(1) A person]~~ (2)(a) An actor commits object rape of a child ~~[when the person]~~ if:

385 (i) the actor causes the penetration or touching, however slight, of the genital or anal

386 opening ~~[of a child who is under the age of 14 by any]~~ of the individual by, except as

387 provided in Subsection (2)(b): VA NOTE: 76-5-407(2)(b)(v) XREF 402.3. ALTHOUGH I AM

388 REPEALING 407, I THINK IT IS COVERED BY THE EXISTING LANGUAGE HERE.

389 PLEASE CHECK

390 (A) a foreign object~~[:]~~ ;

391 (B) a substance~~[:]~~ ;

392 (C) an instrument~~[:]~~ ; or

393 (D) a device~~[: not including a part of the human body, with intent]~~ ;

394 (ii) the actor:

395 (A) intends to cause substantial emotional or bodily pain to the ~~[child]~~ victim; or ~~[with~~  
396 ~~the intent]~~

397 (B) intends to arouse or gratify the sexual desire of any ~~[person:]~~ individual VA

398 NOTE: SHOULD THIS ALSO INCLUDE A 3RD PARTY/DOES IT CURRENTLY INCLUDE  
399 3RD PARTY?; and

400 (iii) the individual is under the age of 14.

401 (b) Subsection (2)(a) does not include penetration or touching by a part of the human  
402 body.

403 ~~[(2) Object rape of a child]~~ (3) A violation of Subsection (2) is a first degree felony  
404 punishable by a term of imprisonment of:

405 (a) except as provided in Subsections ~~[(2)]~~ (3) (b) and (4), not less than 25 years and  
406 which may be for life; or

407 (b) life without parole, if the trier of fact finds that:

408 (i) during the course of the commission of the object rape of a child the defendant  
409 caused serious bodily injury to another; or

410 (ii) at the time of the commission of the object rape of a child the defendant was  
411 previously convicted of a grievous sexual offense.

412 ~~[(3)]~~ (4) Subsection ~~[(2)]~~ (3) (b) does not apply if the defendant was younger than 18  
413 years of age at the time of the offense.

414 ~~[(4)]~~ (5) (a) When imposing a sentence under Subsection ~~[(2)]~~ (3) (a) and ~~[(4)]~~ (5)

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415 (b), a court may impose a term of imprisonment under Subsection ~~[(4)]~~ (5)(b) if:

416 (i) it is a first time offense for the defendant under this section;

417 (ii) the defendant was younger than 21 years of age at the time of the offense; and

418 (iii) the court finds that a lesser term than the term described in Subsection ~~[(2)]~~ (3)

419 (a) is in the interests of justice under the facts and circumstances of the case, including the  
420 age of the ~~[victim]~~ individual who is harmed, and states the reasons for this finding on the  
421 record.

422 (b) If the conditions of Subsection ~~[(4)]~~ (5)(a) are met, the court may impose a term  
423 of imprisonment of not less than:

424 (i) 15 years and which may be for life;

425 (ii) 10 years and which may be for life; or

426 (iii) six years and which may be for life.

427 ~~[(5)]~~ (6) Imprisonment under this section is mandatory in accordance with Section  
428 76-3-406.

### 429 **76-5-403. Forcible sodomy -- Penalties .**

430 (1) (a) As used in this section, "sodomy" means engaging in any sexual act with an  
431 individual who is 14 years ~~[of age]~~ old or older involving the genitals of one individual and  
432 the mouth or anus of another individual~~[, regardless of the sex of either participant]~~.

433 (b) Definitions of terms in Section 76-1-101.5 apply to this section.

434 (2) (a) An ~~[individual]~~ actor commits forcible sodomy when the actor commits  
435 sodomy upon ~~[another]~~ an individual without the ~~[other's]~~ individual's consent.

436 (b) Any touching, however slight, is sufficient to constitute the relevant element of a  
437 violation of Subsection (2)(a). VA NOTE: THIS LANGUAGE IS MOVED FROM 76-5-  
438 407(2)(b)(iii) PLEASE CHECK

439 (3) ~~[Forcible sodomy]~~ A violation of Subsection (2) is a first degree felony,  
440 punishable by a term of imprisonment of:

441 (a) except as provided in Subsection (3)(b) or (c), not less than five years and which  
442 may be for life;

443 (b) except as provided in Subsection (3)(c) or (4), 15 years and which may be for life,  
444 if the trier of fact finds that:

445 (i) during the course of the commission of the forcible sodomy the defendant caused  
446 serious bodily injury to another; or

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447 (ii) at the time of the commission of the rape, the defendant was younger than 18  
448 years of age and was previously convicted of a grievous sexual offense; or

449 (c) life without parole, if the trier of fact finds that at the time of the commission of the  
450 forcible sodomy the defendant was previously convicted of a grievous sexual offense.

451 (4) If, when imposing a sentence under Subsection (3)(b), a court finds that a lesser  
452 term than the term described in Subsection (3)(b) is in the interests of justice and states the  
453 reasons for this finding on the record, the court may impose a term of imprisonment of not  
454 less than:

455 (a) 10 years and which may be for life; or

456 (b) six years and which may be for life.

457 (5) The provisions of Subsection (4) do not apply when ~~[an individual]~~ a defendant is  
458 sentenced under Subsection (3)(a) or (c).

459 (6) Imprisonment under Subsection (3)(b), (3)(c), or (4) is mandatory in accordance  
460 with Section 76-3-406.

### 461 **76-5-403.1. Sodomy on a child -- Penalties .**

462 (1) Definitions of terms in Section 76-1-101.5 apply to this section.

463 ~~[(1) A person]~~ (2)(a) An actor commits sodomy ~~[upon]~~ on a child if :

464 (i) the actor engages in any sexual act upon or with ~~[a child who is under the age of~~  
465 ~~14, involving]~~ an individual;

466 (ii) the individual is younger than 14 years old; and

467 (iii) the sexual act involves the genitals or anus of the actor or the ~~[child]~~ individual

468 and the mouth or anus of either ~~[person, regardless of the sex of either participant]~~ the actor  
469 or individual.

470 (b) Any touching, even if accomplished through clothing, is sufficient to constitute the

471 relevant element of a violation of Subsection (2)(a)(i). VA NOTE: THIS LANGUAGE IS

472 MOVED FROM 76-5-407(3)(a) PLEASE CHECK

473 ~~[(2) Sodomy upon a child]~~ (3) A violation of Subsection (2)(a) is a first degree felony  
474 punishable by a term of imprisonment of:

475 (a) except as provided in Subsections ~~[(2)]~~ (3) (b) and ~~[(4)]~~ (5), not less than 25  
476 years and which may be for life; or

477 (b) life without parole, if the trier of fact finds that:

478 (i) during the course of the commission of the sodomy ~~[upon]~~ on a child the

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479 defendant caused serious bodily injury to another; or

480 (ii) at the time of the commission of the sodomy ~~upon~~ on a child, the defendant was  
481 previously convicted of a grievous sexual offense.

482 ~~[(3)]~~ (4) Subsection ~~[(2)]~~ (3) (b) does not apply if the defendant was younger than 18  
483 years ~~[of age]~~ old at the time of the offense.

484 ~~[(4)]~~ (5) (a) When imposing a sentence under Subsection ~~[(2)]~~ (3) (a) and ~~[(4)]~~ (5)  
485 (b), a court may impose a term of imprisonment under Subsection ~~[(4)]~~ (5) (b) if:

486 (i) it is a first time offense for the defendant under this section;

487 (ii) the defendant was younger than 21 years ~~[of age]~~ old at the time of the offense;

488 and

489 (iii) the court finds that a lesser term than the term described in Subsection ~~[(2)]~~ (3)  
490 (a) is in the interests of justice under the facts and circumstances of the case, including the  
491 age of the ~~[victim]~~ harmed individual, and states the reasons for this finding on the record.

492 (b) If the conditions of Subsection ~~[(4)]~~ (5) (a) are met, the court may impose a term  
493 of imprisonment of not less than:

494 (i) 15 years and which may be for life;

495 (ii) 10 years and which may be for life; or

496 (iii) six years and which may be for life.

497 ~~[(5)]~~ (6) Imprisonment under this section is mandatory in accordance with Section  
498 76-3-406.

### 499 **76-5-404. Forcible sexual abuse -- Penalties .**

500 (1)(a) As used in this section, "indecent liberties" means the same as that term is  
501 defined in Section 76-5-401.1.

502 (b) Definitions of terms in Section 76-1-101.5 apply to this section.

503 VA NOTE: PLEASE REVIEW FOLLOWING REWRITE

504 ~~[(1) An individual]~~ (2)(a) Except as provided in Subsection (4), an actor commits  
505 forcible sexual abuse if :

506 (i) the [victim] harmed individual is 14 years [of age] old or older ; [and, under  
507 circumstances not amounting to rape, object rape, forcible sodomy, or attempted rape or  
508 forcible sodomy;]

509 (ii) the actor ;

510 (A) touches the anus, buttocks, pubic area, or any part of the genitals of [another, or]

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511 the harmed individual;  
512 (B) touches the breast of a female~~[-];~~ or  
513 (C) otherwise takes indecent liberties with ~~[another, with intent]~~ the harmed  
514 individual; and  
515 (iii) the actor intends, without the consent of the harmed individual, to :  
516 (A) cause substantial emotional or bodily pain to any individual ~~[or with the intent to]~~ ;  
517 or  
518 (B) arouse or gratify the sexual desire of any individual~~[-, without the consent of the~~  
519 ~~other, regardless of the sex of any participant]~~. VA NOTE: (A) AND (B) HERE SAY "ANY  
520 INDIVIDUAL." IS THAT MEANT TO INCLUDE THE VICTIM AND/OR 3RD PARTY?  
521 (b) Any touching, even if accomplished through clothing, is sufficient to constitute the  
522 relevant element of a violation of Subsection (2)(a). VA NOTE: THIS LANGUAGE IS MOVED  
523 FROM 76-5-407(3)(e) PLEASE CHECK  
524 ~~[(2) Forcible sexual abuse]~~ (3)(a) A violation of Subsection (2) is[-  
525 ~~— (a) except as provided in Subsection (2)(b);]~~ a felony of the second degree,  
526 punishable by a term of imprisonment of not less than one year nor more than 15 years~~[-or]~~  
527 :-  
528 ~~[(b) except as provided in Subsection (3);]~~ (b)(i) Notwithstanding Subsection (3)(a)  
529 and except as provided in Subsection (3)(b)(ii), a violation of Subsection (2) is a felony of the  
530 first degree, punishable by a term of imprisonment for 15 years and which may be for life, if  
531 the trier of fact finds that during the course of the commission of the forcible sexual abuse  
532 the defendant caused serious bodily injury to another.  
533 ~~[(3)]~~ (ii) If, when imposing a sentence under Subsection ~~[(2)]~~ (3) (b), a court finds  
534 that a lesser term than the term described in Subsection ~~[(2)(b)]~~ (3)(b)(i) is in the interests of  
535 justice and states the reasons for this finding on the record, the court may impose a term of  
536 imprisonment of not less than:  
537 ~~[(a)]~~ (A) 10 years and which may be for life; or  
538 ~~[(b)]~~ (B) six years and which may be for life.  
539 (4) If the conduct of the actor described in Subsection (2)(a) amounts to a violation  
540 under one or more of the following, or an attempt to violate one or more of the following, the  
541 actor shall be charged with the violation and not under Subsection (2)(a):  
542 (a) rape, in violation of Section 76-5-402;

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(b) object rape, in violation of Section 76-5-402.2; or

(c) forcible sodomy, in violation of Section 76-5-403.

~~[(4)]~~ (6) Imprisonment under Subsection ~~[(2)]~~ (3) (b) or ~~[(3)]~~ (4) is mandatory in accordance with Section 76-3-406.

### **76-5-404.1. Sexual abuse of a child ~~[--Aggravated sexual abuse of a child] --~~**

#### **Penalties**.

(1) (a) As used in this section:

~~[(a)]~~ (i) "Adult" means an individual 18 years ~~[of age]~~ old or older.

~~[(b)]~~ (ii) "Child" means an individual ~~[under the age of 14]~~ younger than 14 years old

(iii) "Indecent liberties" means the same as that term is defined in Section 76-5-401.1.

~~[(c)]~~ (iv) "Position of special trust" means:

~~[(i)]~~ (A) an adoptive parent;

~~[(ii)]~~ (B) an athletic manager who is an adult;

~~[(iii)]~~ (C) an aunt;

~~[(iv)]~~ (D) a babysitter;

~~[(v)]~~ (E) a coach;

~~[(vi)]~~ (F) a cohabitant of a parent if the cohabitant is an adult;

~~[(vii)]~~ (G) a counselor;

~~[(viii)]~~ (H) a doctor or physician;

~~[(ix)]~~ (I) an employer;

~~[(x)]~~ (J) a foster parent;

~~[(xi)]~~ (K) a grandparent;

~~[(xii)]~~ (L) a legal guardian;

~~[(xiii)]~~ (M) a natural parent;

~~[(xiv)]~~ (N) a recreational leader who is an adult;

~~[(xv)]~~ (O) a religious leader;

~~[(xvi)]~~ (P) a sibling or a stepsibling who is an adult;

~~[(xvii)]~~ (Q) a scout leader who is an adult;

~~[(xviii)]~~ (R) a stepparent;

~~[(xix)]~~ (S) a teacher or any other individual employed by or volunteering at a public or private elementary school or secondary school, and who is 18 years ~~[of age]~~ old or older;

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575 ~~[(xx)]~~ (T) an instructor, professor, or teaching assistant at a public or private  
576 institution of higher education;  
577 ~~[(xxi)]~~ (U) an uncle;  
578 ~~[(xxii)]~~ (V) a youth leader who is an adult; or  
579 ~~[(xxiii)]~~ (W) any individual in a position of authority, other than those individuals listed  
580 in Subsections (1)~~[(c)(i) through (xxiii)]~~ (a)(iv)(A) through (W), which enables the individual  
581 to exercise undue influence over the child.

582 (b) Definitions of terms in Section 76-1-101.5 apply to this section.

583 (2) ~~[An individual]~~ (a) Except as provided in Subsection (5), an actor commits sexual  
584 abuse of a child if~~[, under circumstances not amounting to rape of a child, object rape of a~~  
585 ~~child, sodomy on a child, or an attempt to commit any of these offenses,]~~ the actor :

586 (i)(A) touches the anus, buttocks, pubic area, or genitalia of any child[;] ;

587 (B) touches the breast of a female child[;] ; or

588 (C) [otherwise] takes indecent liberties with a child[;] ; and

589 (ii) the actor's conduct is with intent to :

590 (A) cause substantial emotional or bodily pain to any individual ; or

591 (B) [with the intent] to arouse or gratify the sexual desire of any individual [regardless  
592 ~~of the sex of any participant].~~

593 (b) Any touching, even if accomplished through clothing, is sufficient to constitute the  
594 relevant element of a violation of Subsection (2)(a). VA NOTE: THIS LANGUAGE IS MOVED  
595 FROM 76-5-407(3)(b) PLEASE CHECK

596 (3) A violation of Subsection (2) is a second degree felony.

597 (4) Imprisonment under this section is mandatory in accordance with Section  
598 76-3-406.

599 (5) If the conduct of the actor described in Subsection (2)(a) amounts to a violation  
600 under one or more of the following, or an attempt to violate one or more of the following, the  
601 actor shall be charged with the violation and not under Subsection (2)(a):

602 (a) rape of a child, in violation of Section 76-5-402.1;

603 (b) object rape of a child, in violation of Section 76-5-402.3; or

604 (c) sodomy on a child, in violation of Section 76-5-403.1.

605 VA NOTE: FOLLOWING MOVED TO NEXT (NEW) SECTION ~~[(3) Sexual abuse of a~~  
606 ~~child is a second degree felony.]~~

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607       ~~[(4) An individual commits aggravated sexual abuse of a child when in conjunction~~  
608 ~~with the offense described in Subsection (2) any of the following circumstances have been~~  
609 ~~charged and admitted or found true in the action for the offense:~~

610       ~~—— (a) the offense was committed by the use of a dangerous weapon as defined in~~  
611 ~~Section 76-1-601, or by force, duress, violence, intimidation, coercion, menace, or threat of~~  
612 ~~harm, or was committed during the course of a kidnapping;~~

613       ~~—— (b) the accused caused bodily injury or severe psychological injury to the victim during~~  
614 ~~or as a result of the offense;~~

615       ~~—— (c) the accused was a stranger to the victim or made friends with the victim for the~~  
616 ~~purpose of committing the offense;~~

617       ~~—— (d) the accused used, showed, or displayed pornography or caused the victim to be~~  
618 ~~photographed in a lewd condition during the course of the offense;~~

619       ~~—— (e) the accused , prior to sentencing for this offense, was previously convicted of any~~  
620 ~~sexual offense;~~

621       ~~—— (f) the accused committed the same or similar sexual act upon two or more victims at~~  
622 ~~the same time or during the same course of conduct;~~

623       ~~—— (g) the accused committed, in Utah or elsewhere, more than five separate acts, which~~  
624 ~~if committed in Utah would constitute an offense described in this chapter, and were~~  
625 ~~committed at the same time, or during the same course of conduct, or before or after the~~  
626 ~~instant offense;~~

627       ~~—— (h) the offense was committed by an individual who occupied a position of special~~  
628 ~~trust in relation to the victim;~~

629       ~~—— (i) the accused encouraged, aided, allowed, or benefitted from acts of prostitution or~~  
630 ~~sexual acts by the victim with any other individual, or sexual performance by the victim before~~  
631 ~~any other individual, human trafficking, or human smuggling; or~~

632       ~~—— (j) the accused caused the penetration, however slight, of the genital or anal opening~~  
633 ~~of the child by any part or parts of the human body other than the genitals or mouth.]~~

634       ~~[(5) Aggravated sexual abuse of a child is a first degree felony punishable by a term~~  
635 ~~of imprisonment of:~~

636       ~~—— (a) except as provided in Subsection (5)(b), (5)(c), or (6) , not less than 15 years and~~  
637 ~~which may be for life;~~

638       ~~—— (b) except as provided in Subsection (5)(c) or (6) , life without parole, if the trier of fact~~

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639 ~~finds that during the course of the commission of the aggravated sexual abuse of a child the~~  
640 ~~defendant caused serious bodily injury to another; or~~  
641 ~~—— (c) life without parole, if the trier of fact finds that at the time of the commission of the~~  
642 ~~aggravated sexual abuse of a child, the defendant was previously convicted of a grievous~~  
643 ~~sexual offense.~~  
644 ~~—— (6) If, when imposing a sentence under Subsection (5)(a) or (b), a court finds that a~~  
645 ~~lesser term than the term described in Subsection (5)(a) or (b) is in the interests of justice~~  
646 ~~and states the reasons for this finding on the record, the court may impose a term of~~  
647 ~~imprisonment of not less than:~~  
648 ~~—— (a) for purposes of Subsection (5)(b), 15 years and which may be for life; or~~  
649 ~~—— (b) for purposes of Subsection (5)(a) or (b):~~  
650 ~~—— (i) 10 years and which may be for life; or~~  
651 ~~—— (ii) six years and which may be for life.~~  
652 ~~—— (7) The provisions of Subsection (6) do not apply when an individual is sentenced~~  
653 ~~under Subsection (5)(c).~~  
654 ~~—— (8) Subsections (5)(b) and (5)(c) do not apply if the defendant was younger than 18~~  
655 ~~years of age at the time of the offense.]~~  
656 ~~[(9) Imprisonment under this section is mandatory in accordance with Section~~  
657 ~~76-3-406.]~~

### **76-5-404.2. Aggravated sexual abuse of a child -- Penalties.**

659 (1)(a) As used in this section:

660 (i) "Adult" means the same as that term is defined in Section 76-4-404.1.

661 (ii) "Child" means the same as that term is defined in Section 76-4-404.1.

662 (iii) "Position of special trust" means the same as that term is defined in Section  
663 76-4-404.1.

664 (b) Definitions of terms in Section 76-1-101.5 apply to this section.

665 VA NOTE: REPLACED INSTANCES OF "VICTIM" WITH "INDIVIDUAL" OR "HARMED  
666 INDIVIDUAL"

(2)(a) An actor commits aggravated sexual abuse of a child if, in  
667 conjunction with the offense described in Subsection 76-4-404.1(2)(a), any of the following  
668 circumstances have been charged and admitted or found true in the action for the offense:

669 (i) the actor committed the offense:

670 (A) by the use of a dangerous weapon;

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(B) by force, duress, violence, intimidation, coercion, menace, or threat of harm; or

(C) during the course of a kidnapping;

(ii) the actor caused bodily injury or severe psychological injury to the harmed

individual during or as a result of the offense;

(iii) the actor was a stranger to the harmed individual or made friends with the harmed

individual for the purpose of committing the offense;

(iv) the actor used, showed, or displayed pornography or caused the harmed

individual to be photographed in a lewd condition during the course of the offense;

(v) the actor, prior to sentencing for this offense, was previously convicted of any

sexual offense;

(vi) the actor committed the same or similar sexual act upon two or more harmed

individuals at the same time or during the same course of conduct;

(vii) the actor committed, in Utah or elsewhere, more than five separate acts, which if

committed in Utah would constitute an offense described in this chapter, and were committed

at the same time, or during the same course of conduct, or before or after the instant

offense;

(viii) the actor occupied a position of special trust in relation to the harmed individual ;

(ix) VA NOTE: CHECK USE OF "INDIVIDUAL" IN LIEU OF VICTIM the actor

encouraged, aided, allowed, or benefitted from acts of prostitution or sexual acts by the

harmed individual with any other individual, or sexual performance by the harmed individual

before any other individual, human trafficking, or human smuggling; or

(x) the actor caused the penetration, however slight, of the genital or anal opening of

the child by any part or parts of the human body other than the genitals or mouth.

(b) Any touching, even if accomplished through clothing, is sufficient to constitute the

relevant element of a violation of Subsection (2)(a). VA NOTE: THIS LANGUAGE IS MOVED

FROM 76-5-407(3)(b) PLEASE CHECK

(3) Except as provided in Subsection (6), a violation of Subsection (2) is a first degree

felony punishable by a term of imprisonment of:

(a) except as provided in Subsection (3)(b), (3)(c), or (4), not less than 15 years and

which may be for life;

(b) except as provided in Subsection (3)(c) or (4), life without parole, if the trier of fact

finds that during the course of the commission of the aggravated sexual abuse of a child the

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defendant caused serious bodily injury to another; or

(c) life without parole, if the trier of fact finds that at the time of the commission of the aggravated sexual abuse of a child, the defendant was previously convicted of a grievous sexual offense.

(4) If, when imposing a sentence under Subsection (3)(a) or (b), a court finds that a lesser term than the term described in Subsection (3)(a) or (b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:

(a) for purposes of Subsection (3)(b), 15 years and which may be for life; or

(b) for purposes of Subsection (3)(a) or (b):

(i) 10 years and which may be for life; or

(ii) six years and which may be for life.

(5) The provisions of Subsection (4) do not apply if a defendant is sentenced under Subsection (3)(c).

(6) Subsection (3)(b) or (3)(c) does not apply if the defendant was younger than 18 years old at the time of the offense.

(7) Imprisonment under this section is mandatory in accordance with Section 76-3-406.

### **76-5-405. Aggravated sexual assault -- Penalty.**

(1) Definitions of terms in Section 76-1-101.5 apply to this section.

~~[(1) A person]~~ (2) An actor commits aggravated sexual assault if:

(a) in the course of a rape, object rape, forcible sodomy, or forcible sexual abuse, the actor:

(i) uses, or threatens ~~[the victim]~~ an individual with the use of, a dangerous weapon ~~[as defined in Section 76-1-601];~~

(ii) compels, or attempts to compel, ~~[the victim]~~ an individual to submit to rape, object rape, forcible sodomy, or forcible sexual abuse, by threat of kidnapping, death, or serious bodily injury to be inflicted imminently on any ~~[person]~~ individual; or

(iii) is aided or abetted by one or more persons;

(b) in the course of an attempted rape, attempted object rape, or attempted forcible sodomy, the actor:

(i) causes serious bodily injury to ~~[any person]~~ an individual;

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735 (ii) uses, or threatens ~~[the victim]~~ an individual with the use of~~;~~ a dangerous  
736 weapon ~~[as defined in Section 76-1-601]~~;

737 (iii) attempts to compel ~~[the victim]~~ an individual to submit to rape, object rape, or  
738 forcible sodomy, by threat of kidnaping, death, or serious bodily injury to be inflicted  
739 imminently on any ~~[person]~~ any individual ; or

740 (iv) is aided or abetted by one or more persons; or

741 (c) in the course of an attempted forcible sexual abuse, the actor:

742 (i) causes serious bodily injury to ~~[any person]~~ an individual ;

743 (ii) uses, or threatens ~~[the victim]~~ an individual with the use of~~;~~ a dangerous  
744 weapon~~[as defined in Section 76-1-601]~~;

745 (iii) attempts to compel ~~[the victim]~~ an individual to submit to forcible sexual abuse,  
746 by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on ~~[any~~  
747 ~~person]~~ an individual ; or

748 (iv) is aided or abetted by one or more persons.

749 ~~[(2) Aggravated sexual assault]~~ (3) A violation of Subsection (2) is a first degree  
750 felony, punishable by a term of imprisonment of:

751 (a) for an aggravated sexual assault described in Subsection ~~[(1)]~~ (2) (a):

752 (i) except as provided in Subsection ~~[(2)]~~ (3) (a)(ii) or ~~[(3)]~~ (4) (a), not less than 15  
753 years and which may be for life; or

754 (ii) life without parole, if the trier of fact finds that at the time of the commission of the  
755 aggravated sexual assault, the defendant was previously convicted of a grievous sexual  
756 offense;

757 (b) for an aggravated sexual assault described in Subsection ~~[(1)]~~ (2) (b):

758 (i) except as provided in Subsection ~~[(2)]~~ (3) (b)(ii) or ~~[(4)]~~ (5) (a), not less than 10  
759 years and which may be for life; or

760 (ii) life without parole, if the trier of fact finds that at the time of the commission of the  
761 aggravated sexual assault, the defendant was previously convicted of a grievous sexual  
762 offense; or

763 (c) for an aggravated sexual assault described in Subsection ~~[(1)]~~ (2) (c):

764 (i) except as provided in Subsection ~~[(2)]~~ (3) (c)(ii) or ~~[(5)]~~ (6) (a), not less than six  
765 years and which may be for life; or

766 (ii) life without parole, if the trier of fact finds that at the time of the commission of the

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767 aggravated sexual assault, the defendant was previously convicted of a grievous sexual  
768 offense.

769 ~~[(3)]~~ (4) (a) If, when imposing a sentence under Subsection ~~[(2)]~~ (3) (a)(i), a court  
770 finds that a lesser term than the term described in Subsection ~~[(2)]~~ (3) (a)(i) is in the interests  
771 of justice and states the reasons for this finding on the record, the court may impose a term  
772 of imprisonment of not less than:

773 (i) 10 years and which may be for life; or

774 (ii) six years and which may be for life.

775 (b) The provisions of Subsection ~~[(3)]~~ (4) (a) do not apply when a ~~[person]~~ defendant  
776 is sentenced under Subsection ~~[(2)]~~ (3) (a)(ii).

777 ~~[(4)]~~ (5) (a) If, when imposing a sentence under Subsection ~~[(2)]~~ (3) (b)(i), a court  
778 finds that a lesser term than the term described in Subsection ~~[(2)]~~ (3) (b)(i) is in the interests  
779 of justice and states the reasons for this finding on the record, the court may impose a term  
780 of imprisonment of not less than six years and which may be for life.

781 (b) The provisions of Subsection ~~[(4)]~~ (5) (a) do not apply when a ~~[person]~~ defendant  
782 is sentenced under Subsection ~~[(2)]~~ (3) (b)(ii).

783 ~~[(5)]~~ (6) (a) If, when imposing a sentence under Subsection ~~[(2)]~~ (3) (c)(i), a court  
784 finds that a lesser term than the term described in Subsection ~~[(2)]~~ (3) (c)(i) is in the interests  
785 of justice and states the reasons for this finding on the record, the court may impose a term  
786 of imprisonment of not less than three years and which may be for life.

787 (b) The provisions of Subsection ~~[(5)]~~ (6) (a) do not apply when a ~~[person]~~ defendant  
788 is sentenced under Subsection ~~[(2)]~~ (3) (c)(ii).

789 ~~[(6)]~~ (7) Subsections ~~[(2)]~~ (3) (a)(ii), ~~[(2)]~~ (3) (b)(ii), and ~~[(2)]~~ (3) (c)(ii) do not apply if  
790 the defendant was younger than 18 years ~~[of age]~~ old at the time of the offense.

791 ~~[(7)]~~ (8) Imprisonment under this section is mandatory in accordance with Section  
792 76-3-406.

793 **76-5-406. Sexual offenses against ~~[the victim]~~ an individual without consent of**  
794 **~~[victim]~~ the individual -- Circumstances.**

795 (1) (a) As used in this section:

796 ~~[(a)]~~ (i) "Health professional" means an individual who is licensed or who holds the  
797 individual out to be licensed, or who otherwise provides professional physical or mental  
798 health services, diagnosis, treatment, or counseling, including :

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(A) an athletic trainer[;] ;

(B) a physician[;] ;

(C) an osteopathic physician[;] ;

(D) a physician assistant[;] ;

(E) a nurse[;] ;

(F) a dentist[;] ;

(G) a physical therapist[;] ;

(H) a chiropractor[;] ;

(I) a mental health therapist[;] ;

(J) a social service worker[;] ;

(K) a clinical social worker[;] ;

(L) a certified social worker[;] ;

(M) a marriage and family therapist[;] ;

(N) a professional counselor[;] ;

(O) a psychiatrist, psychologist, or psychiatric mental health nurse specialist[;] ; or

(P) substance abuse counselor.

(ii) "Position of special trust" means the same as that term is defined in Section 76-5-404.1.

~~(b)~~ (iii) "Religious counselor" means a minister, priest, rabbi, bishop, or other recognized member of the clergy.

~~(c)~~ (iv) "To retaliate" includes threats of physical force, kidnapping, or extortion.

(b) Definitions of terms in Section 76-1-101.5 apply to this section.

(2) An act of sexual intercourse, rape, attempted rape, rape of a child, attempted rape of a child, object rape, attempted object rape, object rape of a child, attempted object rape of a child, forcible sodomy, attempted forcible sodomy, sodomy on a child, attempted sodomy on a child, forcible sexual abuse, attempted forcible sexual abuse, sexual abuse of a child, attempted sexual abuse of a child, aggravated sexual abuse of a child, attempted aggravated sexual abuse of a child, or simple sexual abuse is without consent of ~~[the victim]~~ an individual under any of the following circumstances:

(a) the ~~[victim]~~ individual expresses lack of consent through words or conduct;

(b) the actor overcomes the ~~[victim]~~ individual through the actual application of physical force or violence;

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831 (c) the actor is able to overcome the [victim] individual through concealment or by  
832 the element of surprise;

833 (d) (i) the actor coerces the [victim] individual to submit by threatening to retaliate in  
834 the immediate future against the [victim] individual or any other person, and the [victim]  
835 individual perceives at the time that the actor has the ability to execute this threat; or

836 (ii) the actor coerces the [victim] individual to submit by threatening to retaliate in the  
837 future against the [victim] individual or any other person, and the [victim] individual  
838 believes at the time that the actor has the ability to execute this threat;

839 (e) the actor knows the [victim] individual is unconscious, unaware that the act is  
840 occurring, or is physically unable to resist;

841 (f) the actor knows or reasonably should know that the [victim] individual has a  
842 mental disease or defect, which renders the [victim] individual unable to:

843 (i) appraise the nature of the act;

844 (ii) resist the act;

845 (iii) understand the possible consequences to the [victim's] individual's health or  
846 safety; or

847 (iv) appraise the nature of the relationship between the actor and the [victim]  
848 individual ;

849 (g) the actor knows that the [victim] individual participates because the [victim]  
850 individual erroneously believes that the actor is someone else;

851 (h) the actor intentionally impaired the power of the [victim] individual to appraise or  
852 control ~~[his or her]~~ the individual's conduct by administering [any] a substance to the  
853 individual without the [victim's] individual's knowledge;

854 (i) the [victim] individual is younger than 14 years [of age] old ;

855 (j) the [victim] individual is younger than 18 years [of age] old and at the time of the  
856 offense the actor was the [victim's] individual's parent, stepparent, adoptive parent, or legal  
857 guardian or occupied a position of special trust in relation to the ~~[victim as defined in Section~~  
858 ~~76-5-404.1]~~ individual ;

859 (k) (i) the [victim] individual is 14 years [of age] old or older, but younger than 18  
860 years~~[of age, and]~~ old;

861 (ii) the actor is more than three years older than the [victim] individual; and

862 (iii) the actor entices or coerces the [victim] individual to submit or participate, under

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863 circumstances not amounting to the force or threat required under Subsection (2)(b) or (d); or

864 (I) (i) the actor is a health professional or religious counselor~~[:]~~ ;

865 (ii) the act is committed under the guise of providing professional diagnosis,

866 counseling, or treatment~~[:]~~ ; and

867 (iii) at the time of the act the ~~[victim]~~ individual reasonably believed that the act was  
868 for medically or professionally appropriate diagnosis, counseling, or treatment to the extent  
869 that resistance by the ~~[victim]~~ individual could not reasonably be expected to have been  
870 manifested.

871 (3) ~~[Consent]~~ (a) An individual's consent to any sexual act or prior consensual  
872 activity between or with any party does not necessarily constitute consent to any other sexual  
873 act.

874 (b) ~~[Consent]~~ An individual's consent may be initially given but may be withdrawn  
875 through words or conduct at any time prior to or during sexual activity.

### 876 **76-5-406.3. Applicability of sentencing provisions.**

877 (1) Definitions of terms in Section 76-1-101.5 apply to this section.

878 ~~[A person]~~ (2)(a) A defendant convicted of a violation of Section 76-5-301.1, child  
879 kidnaping; Section 76-5-302, aggravated kidnaping; Section 76-5-402.1, rape of a child;  
880 Section 76-5-402.3, object rape of a child; Section 76-5-403.1, sodomy on a child; Section  
881 76-5-404.1, aggravated sexual abuse of a child; or Section 76-5-405, aggravated sexual  
882 assault shall be sentenced ~~[as follows:]~~ in accordance with this Subsection (2).

883 ~~[(1)]~~ (b) If the ~~[person]~~ defendant is sentenced prior to April 29, 1996, ~~[he]~~ the  
884 defendant shall be sentenced in accordance with the statutory provisions in effect prior to  
885 that date.

886 ~~[(2)]~~ (c) If the ~~[person]~~ defendant commits the crime and is sentenced on or after  
887 April 29, 1996, ~~[he]~~ the defendant shall be punished in accordance with the statutory  
888 provisions in effect after April 29, 1996.

889 ~~[(3)]~~ (d)(i) If the ~~[person]~~ defendant commits the crime prior to April 29, 1996, but is  
890 sentenced on or after April 29, 1996, ~~[he]~~ the defendant shall be given the option prior to  
891 sentencing to proceed either under the law which was in effect at the time the offense was  
892 committed or the law which was in effect at the time of sentencing.

893 (ii) If the ~~[person]~~ defendant refuses to select, the court shall sentence the ~~[person]~~  
894 defendant in accordance with the law in effect at the time of sentencing.

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895 (3) The provisions of Subsections 77-27-9(2)(a) and (b) apply to the sentence of ~~[any~~  
896 ~~person]~~ a defendant who selects under this section to be sentenced in accordance with the  
897 law in effect prior to April 29, 1996.

### 898 **76-5-406.5. Circumstances required for probation or suspension of sentence** 899 **for certain sex offenses against a child.**

900 (1) Definitions of terms in Section 76-1-101.5 apply to this section.

901 ~~[(1)]~~ (2) In a case involving a conviction for a violation of Section 76-5-402.1, rape of  
902 a child; Section 76-5-402.3, object rape of a child; Section 76-5-403.1, sodomy on a child; or  
903 any attempt to commit a felony under those sections or a conviction for a violation of  
904 Subsections 76-5-404.1(4) and (5), aggravated sexual abuse of a child, the court may  
905 suspend execution of sentence and consider probation to a residential sexual abuse  
906 treatment center only if all of the following circumstances are found by the court to be present  
907 and the court in its discretion, considering the circumstances of the offense, including the  
908 nature, frequency, and duration of the conduct, and considering the best interests of the  
909 public and the ~~[child-victim]~~ harmed individual, finds probation to a residential sexual abuse  
910 treatment center to be proper:

911 (a) the defendant did not use a weapon, force, violence, substantial duress or  
912 menace, or threat of harm, in committing the offense or before or after committing the  
913 offense, in an attempt to frighten the ~~[child-victim]~~ harmed individual or keep the ~~[child-victim]~~  
914 harmed individual from reporting the offense;

915 (b) the defendant did not cause bodily injury to the ~~[child-victim]~~ harmed individual  
916 during or as a result of the offense and did not cause the ~~[child-victim]~~ harmed individual  
917 severe psychological harm;

918 (c) the defendant, prior to the offense, had not been convicted of any public offense in  
919 Utah or elsewhere involving sexual misconduct in the commission of the offense;

920 (d) the defendant did not commit an offense described in this Part 4, Sexual  
921 Offenses, against more than one ~~[child-victim or victim]~~ harmed individual, at the same time,  
922 or during the same course of conduct, or previous to or subsequent to the instant offense;

923 (e) the defendant did not use, show, or display pornography or create sexually-related  
924 photographs or tape recordings in the course of the offense;

925 (f) the defendant did not act in concert with another offender during the offense or  
926 knowingly commit the offense in the presence of ~~[a person]~~ an individual other than the

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927 ~~[victim]~~ harmed individual or with lewd intent to reveal the offense to another;

928 (g) the defendant did not encourage, aid, allow, or benefit from any act of prostitution  
929 or sexual act by the ~~[child-victim]~~ harmed individual with any other ~~[person]~~ individual or  
930 sexual performance by the ~~[child-victim]~~ harmed individual before any other ~~[person]~~  
931 individual;

932 (h) the defendant admits the offense of which ~~[he]~~ the defendant has been convicted  
933 and has been accepted for mental health treatment in a residential sexual abuse treatment  
934 center that has been approved by the Department of Corrections under Subsection ~~[(3)]~~ (4);

935 (i) rehabilitation of the defendant through treatment is probable, based upon evidence  
936 provided by a treatment professional who has been approved by the Department of  
937 Corrections under Subsection (3) and who has accepted the defendant for treatment;

938 (j) prior to being sentenced, the defendant has undergone a complete psychological  
939 evaluation conducted by a professional approved by the Department of Corrections and:

940 (i) the professional's opinion is that the defendant is not an exclusive pedophile and  
941 does not present an immediate and present danger to the community if released on  
942 probation and placed in a residential sexual abuse treatment center; and

943 (ii) the court accepts the opinion of the professional;

944 (k) if the offense is committed by a parent, stepparent, adoptive parent, or legal  
945 guardian of the ~~[child-victim]~~ harmed individual, the defendant shall, in addition to  
946 establishing all other conditions of this section, establish it is in the ~~[child-victim's]~~ harmed  
947 individual's best interest that the defendant not be imprisoned, by presenting evidence  
948 provided by a treatment professional who:

949 (i) is treating the ~~[child-victim]~~ harmed individual and understands he will be treating  
950 the family as a whole; or

951 (ii) has assessed the ~~[child-victim]~~ harmed individual for purposes of treatment as  
952 ordered by the court based on a showing of good cause; and

953 (l) if probation is imposed, the defendant, as a condition of probation, may not reside  
954 in a home where children younger than 18 years ~~[of-age]~~ old reside for at least one year  
955 beginning with the commencement of treatment, and may not again take up residency in a  
956 home where children younger than 18 years ~~[of-age]~~ old reside during the period of  
957 probation until allowed to do so by order of the court.

958 ~~[(2)]~~ (3) A term of incarceration of at least 90 days is to be served prior to treatment

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959 and continue until the time when bed space is available at a residential sexual abuse  
960 treatment center as provided under Subsection ~~[(3)]~~ (4) and probation is to be imposed for  
961 up to a maximum of 10 years.

962 ~~[(3)]~~ (4) (a) The Department of Corrections shall develop qualification criteria for the  
963 approval of the sexual abuse treatment programs and professionals under this section.

964 (b) The criteria shall include the screening criteria employed by the department for  
965 sexual offenders.

966 ~~[(b)]~~ (c) The sexual abuse treatment program shall be at least one year in duration,  
967 shall be residential, and shall specifically address the sexual conduct for which the defendant  
968 was convicted.

969 ~~[(4)]~~ (5)(a) Establishment by the defendant of all the criteria of this section does not  
970 mandate the granting under this section of probation or modification of the sentence that  
971 would otherwise be imposed by Section 76-3-406 regarding sexual offenses against children.

972 (b) The court has discretion to deny the request based upon its consideration of the  
973 circumstances of the offense, including:

974 ~~[(a)]~~ (i) the nature, frequency, and duration of the conduct;

975 ~~[(b)]~~ (ii) the effects of the conduct on any ~~[child-victim]~~ harmed individual involved;

976 ~~[(c)]~~ (iii) the best interest of the public and any ~~[child-victim]~~ harmed individual; and

977 ~~[(d)]~~ (iv) the characteristics of the defendant, including any risk the defendant

978 presents to the public and specifically to children.

979 ~~[(5)]~~ (6) The defendant has the burden to establish by a preponderance of evidence  
980 eligibility under all of the criteria of this section.

981 ~~[(6)]~~ (7) If the court finds a defendant granted probation under this section fails to  
982 cooperate or succeed in treatment or violates probation to any substantial degree, the  
983 sentence previously imposed for the offense shall be immediately executed.

984 ~~[(7)]~~ (8) The court shall enter written findings of fact regarding the conditions  
985 established by the defendant that justify the granting of probation under this section.

986 ~~[(8)]~~ (9)(a) In cases involving conviction of any sexual offense against a child other  
987 than those offenses provided in Subsection ~~[(1)]~~ (2), the court shall consider the  
988 circumstances described in Subsection ~~[(1)]~~ (2) as advisory in determining whether or not  
989 execution of sentence should be suspended and probation granted.

990 (b) The defendant is not required to satisfy all of those circumstances for eligibility

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991 ~~[pursuant to]~~ under this Subsection ~~[(8)]~~ (9)(a).

992 **76-5-407. Applicability of part -- ~~["Penetration" or "touching" sufficient to~~**  
993 **~~constitute offense]~~ Consensual conduct in marriage .**

994 ~~[(1)]~~ The provisions of this part do not apply to consensual conduct between  
995 individuals married to each other.

996 VA NOTE: THE FOLLOWING PROVISIONS HAVE BEEN MOVED TO THE RESPECTIVE  
997 OFFENSE STATUTES.

998 ~~[(2) In any prosecution for:~~

999 ~~—— (a) the following offenses, any sexual penetration, however slight, is sufficient to~~  
1000 ~~constitute the relevant element of the offense:~~

1001 ~~—— (i) unlawful sexual activity with a minor, a violation of Section 76-5-401, involving~~  
1002 ~~sexual intercourse;~~

1003 ~~—— (ii) unlawful sexual conduct with a 16 or 17 year old, a violation of Section 76-5-401.2,~~  
1004 ~~involving sexual intercourse; or~~

1005 ~~—— (iii) rape, a violation of Section 76-5-402; or~~

1006 ~~—— (b) the following offenses, any touching, however slight, is sufficient to constitute the~~  
1007 ~~relevant element of the offense:~~

1008 ~~—— (i) unlawful sexual activity with a minor, a violation of Section 76-5-401, involving acts~~  
1009 ~~of sodomy;~~

1010 ~~—— (ii) unlawful sexual conduct with a 16 or 17 year old, a violation of Section 76-5-401.2,~~  
1011 ~~involving acts of sodomy;~~

1012 ~~—— (iii) forcible sodomy, a violation of Subsection 76-5-403(2);~~

1013 ~~—— (iv) rape of a child, a violation of Section 76-5-402.1; or~~

1014 ~~—— (v) object rape of a child, a violation of Section 76-5-402.3.~~

1015 ~~—— (3) In any prosecution for the following offenses, any touching, even if accomplished~~  
1016 ~~through clothing, is sufficient to constitute the relevant element of the offense:~~

1017 ~~—— (a) sodomy on a child, a violation of Section 76-5-403.1;~~

1018 ~~—— (b) sexual abuse of a child or aggravated sexual abuse of a child, a violation of~~  
1019 ~~Section 76-5-404.1;~~

1020 ~~—— (c) sexual abuse of a minor, a violation of Section 76-5-401.1;~~

1021 ~~—— (d) unlawful sexual conduct with a 16- or 17-year-old, a violation of Section~~  
1022 ~~76-5-401.2;~~

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1023 ~~— (e) forcible sexual abuse, a violation of Section 76-5-404;~~  
1024 ~~— (f) custodial sexual relations, a violation of Section 76-5-412; or~~  
1025 ~~— (g) custodial sexual relations or misconduct with youth receiving state services, a~~  
1026 ~~violation of Section 76-5-413.]~~

1027 **76-5-409. Corroboration of admission by child's statement.**

1028 (1)(a) As used in this section, "child" means an individual under younger than 14  
1029 years old.

1030 (b) Definitions of terms in Section 76-1-101.5 apply to this section.

1031 ~~[(+)]~~ (2) Notwithstanding any provision of law requiring corroboration of admissions  
1032 or confessions, and notwithstanding any prohibition of hearsay evidence, a child's statement  
1033 indicating in any manner the occurrence of the sexual offense involving the child is sufficient  
1034 corroboration of the admission or the confession regardless of whether or not the child is  
1035 available to testify regarding the offense.

1036 ~~[(2) A child, for purposes of Subsection (1), is a person under the age of 14.]~~

1037 **76-5-410. ~~[Child victim of sexual abuse]~~ Sexually abused individual as**  
1038 **competent witness -- Age of witness .**

1039 (1) Definitions of terms in Section 76-1-101.5 apply to this section.

1040 (2) ~~[A child victim of sexual abuse under the age of 10]~~ An individual younger than  
1041 10 years old who was sexually abused is a competent witness and shall be allowed to testify  
1042 without prior qualification in any judicial proceeding.

1043 (3) The trier of fact shall determine the weight and credibility of the testimony  
1044 described in Subsection (2) .

1045 **76-5-412. Custodial sexual relations ~~[--Custodial sexual misconduct--~~**  
1046 **Definitions] -- Penalties -- Defenses.**

1047 (1) (a) As used in this section:

1048 ~~[(a)]~~ (i) "Actor" means:

1049 ~~[(+)]~~ (A) a correctional officer, as defined in Section 53-13-104;

1050 ~~[(+)]~~ (B) a special function officer, as defined in Section 53-13-105;

1051 ~~[(+)]~~ (C) a law enforcement officer, as defined in Section 53-13-103; or

1052 ~~[(+)]~~ (D) an employee of, or private provider or contractor for, the Department of  
1053 Corrections or a county jail.

1054 (ii) "Indecent liberties" means the same as that term is defined in Section 76-5-401.1.

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1055 ~~[(b)]~~ (iii) "Person in custody" means an individual, either an adult 18 years ~~[of age]~~  
1056 old or older, or a minor younger than 18 years ~~[of age]~~ old, who is:

1057 ~~[(f)]~~ (A) a prisoner, as defined in Section 76-5-101, and includes a prisoner who is in  
1058 the custody of the Department of Corrections created under Section 64-13-2, but who is  
1059 being housed at the Utah State Hospital established under Section 62A-15-601 or other  
1060 medical facility;

1061 ~~[(f)]~~ (B) under correctional supervision, such as at a work release facility or as a  
1062 parolee or probationer; or

1063 ~~[(f)]~~ (C) under lawful or unlawful arrest, either with or without a warrant.

1064 ~~[(c)]~~ (iv) "Private provider or contractor" means ~~[any person or entity]~~ a person that  
1065 contracts with the Department of Corrections or with a county jail to provide services or  
1066 functions that are part of the operation of the Department of Corrections or a county jail  
1067 under state or local law.

1068 (b) Definitions of terms in Section 76-1-101.5 apply to this section.

1069 (2) (a) An actor commits custodial sexual relations if the actor commits any of the acts  
1070 under Subsection ~~[(3)]~~ (2)(b):

1071 (i) under circumstances not amounting to commission of, or an attempt to commit, an  
1072 offense under Subsection ~~[(6)]~~ (4); and

1073 (ii) (A) the actor knows that the individual is a person in custody; or

1074 (B) a reasonable person in the actor's position should have known under the  
1075 circumstances that the individual was a person in custody.

1076 (b) Acts referred to in Subsection (2)(a) are:

1077 (i) having sexual intercourse with a person in custody;

1078 (ii) engaging in a sexual act with a person in custody involving the genitals of one  
1079 individual and the mouth or anus of another individual; or

1080 (ii)(A) causing the penetration, however slight, of the genital or anal opening of a  
1081 person in custody by any foreign object, substance, instrument, or device, including a part of  
1082 the human body; and

1083 (B) intending to cause substantial emotional or bodily pain to an individual. VA NOTE:  
1084 DELETED REGARDLESS OF SEX OF PARTICIPANT

1085 (c) Any touching, even if accomplished through clothing, is sufficient to constitute the  
1086 relevant element of a violation of Subsection (2)(a). VA NOTE: THIS LANGUAGE IS MOVED

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1087 FROM 76-5-407(3)(f) PLEASE CHECK

1088 ~~[(b)]~~ (3)(a) A violation of Subsection (2)~~[(a)]~~ is a third degree felony~~[-, but if-]~~ .

1089 (b) Notwithstanding Subsection (3)(a), if the person in custody is younger than 18  
1090 years ~~[of age]~~ old, a violation of Subsection (2)~~[(a)]~~ is a second degree felony.

1091 (c) If the act committed under ~~[this]~~ Subsection ~~[(2)]~~ (3) amounts to an offense  
1092 subject to a greater penalty under another provision of state law than is provided under this  
1093 Subsection ~~[(2)]~~ (3) , this Subsection ~~[(2)]~~ (3) does not prohibit prosecution and sentencing  
1094 for the more serious offense.

1095 VA NOTE: FOLLOWING MOVED TO NEXT (NEW) SECTION ~~[(3) Acts referred to in~~  
1096 ~~Subsection (2)(a) are:~~

1097 ~~—— (a) having sexual intercourse with a person in custody;~~

1098 ~~—— (b) engaging in any sexual act with a person in custody involving the genitals of one~~  
1099 ~~individual and the mouth or anus of another individual, regardless of the sex of either~~  
1100 ~~participant; or~~

1101 ~~—— (c) causing the penetration, however slight, of the genital or anal opening of a person~~  
1102 ~~in custody by any foreign object, substance, instrument, or device, including a part of the~~  
1103 ~~human body, with the intent to cause substantial emotional or bodily pain to any individual,~~  
1104 ~~regardless of the sex of any participant.]~~

1105 ~~[(4) (a) An actor commits custodial sexual misconduct if the actor commits any of the~~  
1106 ~~acts under Subsection (5):~~

1107 ~~—— (i) under circumstances not amounting to commission of, or an attempt to commit, an~~  
1108 ~~offense under Subsection (6); and~~

1109 ~~—— (ii) (A) the actor knows that the individual is a person in custody; or~~

1110 ~~—— (B) a reasonable person in the actor's position should have known under the~~  
1111 ~~circumstances that the individual was a person in custody:~~

1112 ~~—— (b) A violation of Subsection (4)(a) is a class A misdemeanor, but if the person in~~  
1113 ~~custody is younger than 18 years of age, a violation of Subsection (4)(a) is a third degree~~  
1114 ~~felony:~~

1115 ~~—— (c) If the act committed under this Subsection (4) amounts to an offense subject to a~~  
1116 ~~greater penalty under another provision of state law than is provided under this Subsection~~  
1117 ~~(4), this Subsection (4) does not prohibit prosecution and sentencing for the more serious~~  
1118 ~~offense:~~

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1119 ~~\_\_\_\_\_ (5) Acts referred to in Subsection (4)(a) are the following acts when committed with~~  
1120 ~~the intent to cause substantial emotional or bodily pain to any individual or with the intent to~~  
1121 ~~arouse or gratify the sexual desire of any individual, regardless of the sex of any participant:~~

1122 ~~\_\_\_\_\_ (a) touching the anus, buttocks, pubic area, or any part of the genitals of a person in~~  
1123 ~~custody;~~

1124 ~~\_\_\_\_\_ (b) touching the breast of a female person in custody; or~~

1125 ~~\_\_\_\_\_ (c) otherwise taking indecent liberties with a person in custody.]~~

1126 ~~[(6)]~~ (4) The offenses referred to in Subsections (2)(a)(i) and ~~[(4)(a)(i)]~~ Subsection  
1127 76-5-412.5(2)(a)(i) are:

1128 (a) Section 76-5-401, unlawful sexual activity with a minor;

1129 (b) Section 76-5-402, rape;

1130 (c) Section 76-5-402.1, rape of a child;

1131 (d) Section 76-5-402.2, object rape;

1132 (e) Section 76-5-402.3, object rape of a child;

1133 (f) Section 76-5-403, forcible sodomy;

1134 (g) Section 76-5-403.1, sodomy on a child;

1135 (h) Section 76-5-404, forcible sexual abuse;

1136 (i) Section 76-5-404.1, sexual abuse of a child or aggravated sexual abuse of a child;

1137 or

1138 (j) Section 76-5-405, aggravated sexual assault.

1139 ~~[(7)]~~ (5) (a) It is not a defense to the commission of , or the attempt to commit, the

1140 offense of custodial sexual relations under Subsection (2) ~~[or custodial sexual misconduct~~

1141 ~~under Subsection (4), or an attempt to commit either of these offenses,]~~ if the person in

1142 custody is younger than 18 years ~~[of age]~~ old, that the actor:

1143 (i) mistakenly believed the person in custody to be 18 years ~~[of age]~~ old or older at  
1144 the time of the alleged offense; or

1145 (ii) was unaware of the true age of the person in custody.

1146 (b) Consent of the person in custody is not a defense to any violation or attempted  
1147 violation of Subsection (2)~~[or (4)]~~.

1148 ~~[(8)]~~ (6) It is a defense that the commission by the actor of an act under Subsection  
1149 (2) ~~[or (4)]~~ is the result of compulsion, as the defense is described in Subsection 76-2-302(1).

1150 **76-5-412.5. Custodial sexual misconduct -- Penalties -- Defenses.**

## WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

1151 VA NOTE: BECAUSE I SEPARATED THIS STATUTE FOR MISCONDUCT OUT FROM  
1152 SEXUAL RELATIONS IN 412, I CHECK 76-5-407(3)(f) TO SEE IF I ALSO NEEDED TO  
1153 ADD THAT LANGUAGE HERE. CURRENTLY, 407(3)(f) ONLY MENTIONS CUSTODIAL  
1154 RELATIONS AND NOT MISCONDUCT SO I **HAVE NOT** ADDED THE LANGUAGE FROM  
1155 407 TO THIS STATUTE, ONLY TO 412. PLEASE CHECK

1156 (1)(a) As used in this section:

1157 (i) "Actor" means the same as that term is defined in Section 76-5-412.

1158 (ii) "Indecent liberties" means the same as that term is defined in Section 76-5-401.1.

1159 (iii) "Person in custody" means the same as that term is defined in Section 76-5-412.

1160 (iv) "Private provider or contractor" means the same as that term is defined in Section  
1161 76-5-412.

1162 (b) Definitions of terms in Section 76-1-101.5 apply to this section.

1163 (2) (a) An actor commits custodial sexual misconduct if:

1164 (i) the actor commits any of the acts under Subsection (2)(b) under circumstances not  
1165 amounting to commission of, or an attempt to commit, an offense under Subsection  
1166 76-5-412(4); and

1167 (ii) (A) the actor knows that the harmed individual is a person in custody; or

1168 (B) a reasonable person in the actor's position should have known under the  
1169 circumstances that the harmed individual was a person in custody.

1170 (b) Acts referred to in Subsection (2)(a) are the following acts when committed with  
1171 the intent to cause substantial emotional or bodily pain to an individual or with the intent to  
1172 arouse or gratify the sexual desire of any individual DELETED REGARDLESS OF SEX OF  
1173 INDIVIDUAL:

1174 (i) touching the anus, buttocks, pubic area, or any part of the genitals of a person in  
1175 custody;

1176 (ii) touching the breast of a female person in custody; or

1177 (iii) otherwise taking indecent liberties with a person in custody.

1178 (3)(a) A violation of Subsection (2) is a class A misdemeanor.

1179 (b) Notwithstanding Subsection (3)(a), if the person in custody is younger than 18  
1180 years old, a violation of Subsection (2) is a third degree felony.

1181 (c) If the act committed under Subsection (2) amounts to an offense subject to a  
1182 greater penalty under another provision of state law than is provided under this Subsection

## WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

1183 (3), this Subsection (3) does not prohibit prosecution and sentencing for the more serious  
1184 offense.

1185 (4) (a) It is not a defense to the commission of, or attempt to commit, the offense  
1186 described in Subsection (2) if the person in custody is younger than 18 years old, that the  
1187 actor:

1188 (i) mistakenly believed the person in custody to be 18 years old or older at the time of  
1189 the alleged offense; or

1190 (ii) was unaware of the true age of the person in custody.

1191 (b) Consent of the person in custody is not a defense to any violation or attempted  
1192 violation of Subsection (2).

1193 (5) It is a defense that the commission by the actor of an act under Subsection (2) is  
1194 the result of compulsion, as the defense is described in Subsection 76-2-302(1).

1195 **76-5-413 Custodial sexual relations ~~[or misconduct]~~ with youth receiving state**  
1196 **services ~~[--Definitions]~~ -- Penalties -- Defenses.**

1197 (1) (a) As used in this section:

1198 ~~[(a)]~~ (i) "Actor" means:

1199 ~~[(i)]~~ (A) an individual employed by the Department of Human Services, as created in  
1200 Section 62A-1-102, or an employee of a private provider or contractor; or

1201 ~~[(ii)]~~ (B) an individual employed by the juvenile court of the state, or an employee of  
1202 a private provider or contractor.

1203 ~~[(b)]~~ (ii) "Department" means the Department of Human Services created in Section  
1204 62A-1-102.

1205 (iii) "Indecent liberties" means the same as that term is defined in Section 76-5-401.1.

1206 ~~[(c)]~~ (iv) "Juvenile court" means the juvenile court of the state created in Section  
1207 78A-6-102.

1208 ~~[(d)]~~ (v) "Private provider or contractor" means ~~[any individual or entity]~~ a person  
1209 that contracts with the:

1210 ~~[(i)]~~ (A) department to provide services or functions that are part of the operation of  
1211 the department; or

1212 ~~[(ii)]~~ (B) juvenile court to provide services or functions that are part of the operation  
1213 of the juvenile court.

1214 ~~[(e)]~~ (vi) "Youth receiving state services" means an individual:

## WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

1215 ~~[(f)]~~ (A) younger than 18 years old, except as provided under Subsection ~~[(1)(e)(ii)]~~

1216 (1)(a)(vi)(B), who is:

1217 ~~[(A)]~~ (I) in the custody of the department under Section 80-6-703; or

1218 ~~[(B)]~~ (II) receiving services from any division of the department if any portion of the  
1219 costs of these services is covered by public money; or

1220 ~~[(iii)]~~ (B) younger than 21 years old:

1221 ~~[(A)]~~ (II) who is in the custody of the Division of Juvenile Justice Services, or the  
1222 Division of Child and Family Services; or

1223 ~~[(B)]~~ (II) whose case is under the jurisdiction of the juvenile court.

1224 (b) Definitions of terms in Section 76-1-101.5 apply to this section.

1225 (2) ~~[(a)-An]~~ (a) Except as provided in Subsection (4), an actor commits custodial  
1226 sexual relations with a youth receiving state services if :

1227 (i) the actor commits any of the acts ~~[under Subsection (3):]~~ described in Subsection  
1228 (2)(b); and

1229 ~~[(i) under circumstances not amounting to commission of, or an attempt to commit, an~~  
1230 ~~offense under Subsection (6); and]~~ VA NOTE: SEE SUBSECTION (4)

1231 ~~[(iii)-(A)]~~ (ii)(A) the actor knows that the individual is a youth receiving state services;  
1232 or

1233 ~~[(B)]~~ (B) a reasonable person in the actor's position should have known under the  
1234 circumstances that the individual was a youth receiving state services.

1235 (b) Acts referred to in Subsection (2)(a)(i) are:

1236 (i) having sexual intercourse with a youth receiving state services;

1237 (ii) engaging in any sexual act with a youth receiving state services involving the  
1238 genitals of one individual and the mouth or anus of another individual VA NOTE: REMOVED  
1239 REGARDLESS OF SEX OF PARTICIPANT HERE AND NEXT SUBSECTION; or

1240 (iii)(A) causing the penetration, however slight, of the genital or anal opening of a  
1241 youth receiving state services by any foreign object, substance, instrument, or device,  
1242 including a part of the human body; and

1243 (B) with the intent to cause substantial emotional or bodily pain to any individual,  
1244 regardless of the sex of any participant, or with the intent to arouse or gratify the sexual  
1245 desire of any individual.

1246 (c) Any touching, even if accomplished through clothing, is sufficient to constitute the

## WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

1247 relevant element of a violation of Subsection (2)(a). VA NOTE: THIS LANGUAGE IS MOVED  
1248 FROM 76-5-407(3)(g) PLEASE CHECK

1249 ~~[(b)]~~ (3)(a) A violation of Subsection (2)~~[(a)]~~ is a third degree felony~~[-but if]~~ .  
1250 (b) Notwithstanding Subsection (3)(a), if the youth receiving state services is younger  
1251 than 18 years old, a violation of Subsection (2)~~[(a)]~~ is a second degree felony.

1252 (c) If the act committed under ~~[this]~~ Subsection (2) amounts to an offense subject to a  
1253 greater penalty under another provision of state law than is provided under this Subsection  
1254 ~~[(2)]~~ (3), this Subsection ~~[(2)]~~ (3) does not prohibit prosecution and sentencing for the more  
1255 serious offense.

1256 ~~[(3) Acts referred to in Subsection (2)(a) are:~~

1257 ~~—— (a) having sexual intercourse with a youth receiving state services;~~

1258 ~~—— (b) engaging in any sexual act with a youth receiving state services involving the~~  
1259 ~~genitals of one individual and the mouth or anus of another individual, regardless of the sex~~  
1260 ~~of either participant; or~~

1261 ~~—— (c) causing the penetration, however slight, of the genital or anal opening of a youth~~  
1262 ~~receiving state services by any foreign object, substance, instrument, or device, including a~~  
1263 ~~part of the human body, with the intent to cause substantial emotional or bodily pain to any~~  
1264 ~~individual, regardless of the sex of any participant or with the intent to arouse or gratify the~~  
1265 ~~sexual desire of any individual, regardless of the sex of any participant.]~~

1266 VA NOTE: MOVED TO NEXT (NEW) SECTION) ~~[(4)(a) An actor commits custodial~~  
1267 ~~sexual misconduct with a youth receiving state services if the actor commits any of the acts~~  
1268 ~~under Subsection (5):~~

1269 ~~—— (i) under circumstances not amounting to commission of, or an attempt to commit, an~~  
1270 ~~offense under Subsection (6); and~~

1271 ~~—— (ii) (A) the actor knows that the individual is a youth receiving state services; or~~

1272 ~~—— (B) a reasonable person in the actor's position should have known under the~~  
1273 ~~circumstances that the individual was a youth receiving state services.~~

1274 ~~—— (b) A violation of Subsection (4)(a) is a class A misdemeanor, but if the youth~~  
1275 ~~receiving state services is younger than 18 years old, a violation of Subsection (4)(a) is a~~  
1276 ~~third degree felony.~~

1277 ~~—— (c) If the act committed under this Subsection (4) amounts to an offense subject to a~~  
1278 ~~greater penalty under another provision of state law than is provided under this Subsection~~

## WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

1279 ~~(4), this Subsection (4) does not prohibit prosecution and sentencing for the more serious~~  
1280 ~~offense.~~

1281 ~~—— (5) Acts referred to in Subsection (4)(a) are the following acts when committed with~~  
1282 ~~the intent to cause substantial emotional or bodily pain to any individual or with the intent to~~  
1283 ~~arouse or gratify the sexual desire of any individual, regardless of the sex of any participant:~~

1284 ~~—— (a) touching the anus, buttocks, pubic area, or any part of the genitals of a youth~~  
1285 ~~receiving state services;~~

1286 ~~—— (b) touching the breast of a female youth receiving state services; or~~

1287 ~~—— (c) otherwise taking indecent liberties with a youth receiving state services.]~~

1288 ~~[(6) The offenses referred to in Subsections (2)(a)(i) and (4)(a)(i) are:]~~

1289 (4) If the conduct of the actor amounts to a violation under one or more of the  
1290 following, or an attempt to violate one or more of the following, the actor shall be charged  
1291 with the violation and not under Subsection (2):

1292 (a) ~~[Section 76-5-401,]~~ unlawful sexual activity with a minor , in violation of Section  
1293 76-5-401 ;

1294 (b) ~~[Section 76-5-402,]~~ rape , in violation of Section 76-5-402 ;

1295 (c) ~~[Section 76-5-402.1,]~~ rape of a child , in violation of Section 76-5-402.1 ;

1296 (d) ~~[Section 76-5-402.2,]~~ object rape , in violation of Section 76-5-402.2 ;

1297 (e) ~~[Section 76-5-402.3,]~~ object rape of a child , in violation of Section 76-5-402.3 ;

1298 (f) ~~[Section 76-5-403,]~~ forcible sodomy , in violation of Section 76-5-403 ;

1299 (g) ~~[Section 76-5-403.1,]~~ sodomy on a child , in violation of Section 76-5-403.1 ;

1300 (h) ~~[Section 76-5-404,]~~ forcible sexual abuse , in violation of Section 76-5-404 ;

1301 (i) ~~[Section 76-5-404.1,]~~ sexual abuse of a child ~~[or aggravated sexual abuse of a~~  
1302 ~~child]~~ , in violation of Section 76-5-404.1 ; [or]

1303 (j) aggravated sexual abuse of a child, in violation of Section 76-5-404.2; or

1304 ~~[(j) Section 76-5-405,]~~ (k) aggravated sexual assault , in violation of Section 76-5-  
1305 405 .

1306 ~~[(7)]~~ (5) (a) It is not a defense to the commission of , or an attempt to commit, the  
1307 offense ~~[of custodial sexual relations with a youth receiving state services under]~~ described  
1308 in Subsection (2) ~~[or custodial sexual misconduct with a youth receiving state services under~~  
1309 ~~Subsection (4), or an attempt to commit either of these offenses,]~~ if the youth receiving state  
1310 services is younger than 18 years old, that the actor:

## WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

1311 (i) mistakenly believed the youth receiving state services to be 18 years old or older at  
1312 the time of the alleged offense; or

1313 (ii) was unaware of the true age of the youth receiving state services.

1314 (b) Consent of the youth receiving state services is not a defense to any violation or  
1315 attempted violation of Subsection (2)~~[or (4)]~~.

1316 ~~[(8)]~~ (6) It is a defense that the commission by the actor of an act under Subsection  
1317 (2) ~~[or (4)]~~ is the result of compulsion, as the defense is described in Subsection 76-2-302(1).

### 1318 **76-5-413.5. Custodial sexual misconduct with a youth -- Penalties -- Defenses.**

1319 (1)(a) As used in this section:

1320 (i) "Actor" means the same as that term is defined in Section 76-5-413.

1321 (ii) "Department" means the same as that term is defined in Section 76-5-413.

1322 (iii) "Juvenile court" means the same as that term is defined in Section 76-5-413.

1323 (iv) "Private provider or contractor" means the same as that term is defined in Section  
1324 76-5-413.

1325 (v) "Youth receiving state services" means the same as that term is defined in Section  
1326 76-5-413.

1327 (b) Definitions of terms in Section 76-1-101.5 apply to this section.

1328 (2) (a) Except as provided in Subsection (4), an actor commits custodial sexual  
1329 misconduct with a youth receiving state services if: VA NOTE: SIMILAR CHANGE HERE AS  
1330 413, USING REFERENCE TO SUBSECTION (4)

1331 (i) the actor commits any of the acts described in Subsection (2)(b); and

1332 (ii) (A) the actor knows that the harmed individual is a youth receiving state services;

1333 or

1334 (B) a reasonable person in the actor's position should have known under the  
1335 circumstances that the harmed individual was a youth receiving state services.

1336 (b) Acts referred to in Subsection (2)(a) are the following acts when committed with  
1337 the intent to cause substantial emotional or bodily pain to any individual or with the intent to  
1338 arouse or gratify the sexual desire of any individual:

1339 (i) touching the anus, buttocks, pubic area, or any part of the genitals of a youth  
1340 receiving state services;

1341 (ii) touching the breast of a female youth receiving state services; or

1342 (iii) otherwise taking indecent liberties with a youth receiving state services.

## WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

1343 (c) Any touching, even if accomplished through clothing, is sufficient to constitute the  
1344 relevant element of a violation of Subsection (2)(a). VA NOTE: THIS LANGUAGE IS MOVED  
1345 FROM 76-5-407(3)(g) PLEASE CHECK

1346 (3)(a) A violation of Subsection (2) is a class A misdemeanor.

1347 (b) Notwithstanding Subsectin (3)(a), if the youth receiving state services is younger  
1348 than 18 years old, a violation of Subsection (2) is a third degree felony.

1349 (c) If the act committed under Subsection (2) amounts to an offense subject to a  
1350 greater penalty under another provision of state law than is provided under this Subsection  
1351 (3), this Subsection (3) does not prohibit prosecution and sentencing for the more serious  
1352 offense.

1353 (4) If the conduct of the actor amounts to a violation under one or more of the  
1354 following, or an attempt to violate one or more of the following, the actor shall be charged  
1355 with the violation and not under Subsection (2):

1356 (a) unlawful sexual activity with a minor, in violation of Section 76-5-401,;  
1357 (b) rape, in violation of Section 76-5-402;  
1358 (c) rape of a child, in violation of Section 76-5-402.1;  
1359 (d) object rape, in violation of Section 76-5-402.2;  
1360 (e) object rape of a child, in violation of Section 76-5-402.3;  
1361 (f) forcible sodomy, in violation of Section 76-5-403;  
1362 (g) sodomy on a child, in violation of Section 76-5-403.1;  
1363 (h) forcible sexual abuse, in violation of Section 76-5-404;  
1364 (i) sexual abuse of a child, in violation of Section 76-5-404.1;  
1365 (j) aggravated sexual abuse of a child, in violation of Section 76-5-404.2; or  
1366 (k) aggravated sexual assault, in violation of Section 76-5-405.

1367 (5)(a) It is not a defense to the commission of, or an attempt to commit, the offense  
1368 described in Subsection (2) if the youth receiving state services is younger than 18 years old,  
1369 that the actor:

1370 (i) mistakenly believed the youth receiving state services to be 18 years old or older at  
1371 the time of the alleged offense; or  
1372 (ii) was unaware of the true age of the youth receiving state services.

1373 (b) Consent of the youth receiving state services is not a defense to any violation or  
1374 attempted violation of Subsection (2).

## WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

(6) It is a defense that the commission by the actor of an act under Subsection (2) is the result of compulsion, as the defense is described in Subsection 76-2-302(1).

### **76-5-414. Child conceived as a result of sexual offense -- Custody and parent-time.**

(1) Definitions of terms in Section 76-1-101.5 apply to this section.

~~[(1) A person]~~ (2) If a defendant is convicted of a violation of Title 76, Chapter 5, Part 4, Sexual Offenses, except for Sections 76-5-401 and 76-5-401.2, and that violation results in conception of a child, a court may not ~~[be granted]~~ grant the defendant custody or parent-time rights ~~[by a court]~~ regarding the child, unless:

(a) the nonconvicted biological parent or legal guardian of the child consents and the court determines it is in the best interest of the child to award custody or parent-time to the convicted person; or

(b) after the date of the conviction, the biological parents cohabit and establish a mutual custodial environment for the child.

~~[(2)]~~ (3) A denial of custody or parent-time under this section may not in and of itself:

(a) terminate the parental rights of the ~~[person]~~ individual denied parent-time or custody; or

(b) affect the obligation of the convicted ~~[person]~~ individual to financially support the child.

### **76-5-415. Educator's license subject to action for violation of this part.**

(1)(a) As used in this section, educator means the same as that term is defined in Section 53E-6-102.

(b) Definitions of terms in Section 76-1-101.5 apply to this section.

(2) Commission of any offense under this Title 76, Chapter 5, Part 4, Sexual Offenses, by an educator ~~[as defined in Section 53E-6-102;]~~ is grounds under Section 53E-6-604 for disciplinary action against the educator, including revocation of the educator's license.